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IN THE

Supreme Court of the United States

MCDONNELL DOUGLAS CORPORATION and
GENERAL DYNAMICS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF OF PETITIONERS

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This case presents an important legal question that urgently requires the review of this Court: whether the Federal Circuit should have gutted the longstanding procedural requirement that the Government must consider a public contractor's defenses to a default termination before subjecting the contractor to that drastic sanction. The Government does not

challenge that this is an important legal question worthy of this Court's review; rather, its opposition is largely an argument on the merits as to how the question should be decided if the Court does review it. Nothing in the Government's opposition counsels against immediate review of this important question, which involves the settled expectations of virtually all companies with whom the Government contracts.

1. The Government seeks to deflect attention from the importance of the legal question at issue by spending most of its opposition relating its (mis)characterization of the "facts." Suffice it to say that the trial court's actual findings, *see* Pet. App. 28a-72a, demonstrate that the true facts are not as the Government suggests.[1/]

But the contractors will not quibble here with the Government's factual statement because the important point for purposes of the certiorari petition is that the *legal* question squarely presented by this case cannot be avoided by these factual issues. The question presented *assumes* the existence of performance problems, including even a potential or apparent default. *See* Pet. 13. The legal question is whether the Government, before unilaterally sanctioning a public contractor with a termination for default, must make a reasoned judgment

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1/ The Government challenged *none* of the trial court's factual findings on appeal. *See* Brief for Defendant-Appellant United States, *McDonnell Douglas Corp. v. United States*, Nos. 98-5096, -5122, 5123, at 19 (Fed. Cir. filed June 15, 1998) ("This appeal raises questions of law that are subject to de novo review."). Notably, the Government frequently relies on citations to evidence and to the Court of Appeals (which improperly ignored the trial court's factual findings), rather than on citations to the factual findings of the trial court.

on the merits regarding the contractor's defenses to such a termination, including, for example, its contentions that the Government waived the contract specifications or that the Government is responsible for the performance problems.

2. Although the Government relies upon the lack of an inter-Circuit conflict to argue against review, such reliance is inapposite here. Certiorari is sought in this case on the grounds that the Federal Circuit's ruling will affect virtually all present and future Government contracts and that no other Circuit is likely to ever address the question presented, *see* Pet. 6-7 & n.1 – propositions the Government does not dispute. The opinion below upsets the settled expectations of public contractors by depriving them of a longstanding contractual right to the procedural protection of a meaningful decision prior to a default termination. Review is therefore sought – and urgently needed – because the Federal Circuit's ruling presents an important question that has not, but should be, decided by this Court. *See* Sup. Ct. R. 10.1(c). The importance of this question is highlighted by the amount at stake here: the decision below reversed the final judgment of the trial court entitling these public companies to be paid $1.2 billion in costs they reasonably spent performing this contract, and subjects the contractors to a potential cost forfeiture of over $2.5 billion.

3. Review is not only needed, it is needed *now*. To argue that review is premature – as the Government does – is to beg the question presented. The contractual right the contractors seek to vindicate will be lost if they are first required to expend time and money defending against a drastic default sanction that was imposed by the Government without the procedural protections the contract, longstanding law, and governing

regulations required. Under such circumstances, immediate review is appropriate.[2/]

4. Most fundamentally, the Government makes no attempt to challenge the importance of the legal question presented. None of the Government's arguments weakens the case for review.

The Government does not dispute that it has extraordinary powers to terminate unilaterally its own contracts for alleged default, with dire consequences for public contractors. *See* Pet. 7-9. The Government does not challenge that a default termination is a "drastic sanction," *see Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), through which the Government sought to impose upon these contractors a cost forfeiture of over $2.5 billion. *See* Pet. 6-7. Nor does it contest that the only consequence to the Government if a default termination is set aside is that the Government gets the benefit of a termination for convenience, under which it does not have to pay breach damages. *See* Pet. 8-9. Finally, the Government makes no argument as to why its contracts should not therefore be interpreted, as they long have been, to require the Government to undertake a reasoned judgment on the merits as to the propriety of a default termination, including

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2/ In addition, this case is not "interlocutory" in the usual sense. The trial court entered a final judgment for the contractors and, if this Court were to reverse the Federal Circuit's decision, this case would be concluded. The proceedings related to the legal issue presented here already are complete; no further factual development relevant to that issue will occur in the remand ordered by the Federal Circuit. Moreover, the remand will involve potential litigation of issues that present risks to national security, *see* Pet. App. 20a – risks that could be entirely avoided if this Court reviews this case now.

consideration of a contractor's defenses to such a termination, *prior* to terminating the contract for default. *See John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698 (Ct. Cl. 1955); *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968); *Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987).

The decisions establishing this principle cannot be subjected to the cramped reading the Government (and the Federal Circuit) ascribes to them. The Government, as did the Federal Circuit, would read these cases as requiring only a mere nexus between the default termination and performance issues under the contract. But in each of these cases, there *was* a "nexus" between the default termination and the contractor's performance under the contract. *See Schlesinger*, 390 F.2d at 704-05 (contractor had missed one delivery date, the Government had issued a letter of warning, and the contractor missed a second delivery date the day prior to termination); *John A. Johnson*, 132 F. Supp. at 704 (work was behind schedule, contractor had requested an extension of time, and "[t]he commanding officer was disgusted with the situation . . . and demanded that the Corps of Engineers terminate the plaintiff's right to proceed"); *Darwin*, 811 F.2d at 594 (contractor had completed only 65 percent of the required work by the contract delivery date). What was missing in each of these cases was not some nexus between the termination and the contractor's performance, but a determination on the merits by the Government that the performance issues warranted the

drastic sanction of a default termination.[3/] As the leading government contract scholars have recognized, these cases (at least before the decision below) interpreted government contracts to require, prior to a default termination, "review of a contractor's requests for equitable adjustments or excusable delays, whether any Government fault was involved, and whether the delivery schedule had been waived." *See The A-12 Default Termination: The Mother Of All Terminations*, 13 The Nash & Cibinic Rep., No. 11, p. 166, at 167 (Nov. 1999).[4/]

3/ Even the Government's description of *John A. Johnson* acknowledges that the fatal flaw in that case was that "the contracting officer's 'action in terminating the [contract] for delay did not represent his *judgment as to the merits of the case*.'" *See* Op. Cert. 11 n.5 (quoting *John A. Johnson*, 132 F. Supp. at 705) (emphasis added).

4/ Moreover, the trial court unambiguously found as fact that there was *no such nexus* in this case. The trial court found in unchallenged factual findings, *see supra* note 1, that "the reasons" for terminating for default "were not contractor performance or default." Pet. App. 56a; *see also id.* at 29a (quoting prior Order) ("'Testimony and other evidence at trial showed that the A-12 contract was not terminated because of contractor default.'"); *id.* at 51a-52a ("[t]his case is strikingly similar to *Schlesinger*," where the contract was terminated "*without regard to the circumstances of performance*") (emphasis added). Indeed, the contractors claimed, and the trial court specifically found as fact, that the default termination in this case was *pretextual*. *Id.* at 59a (finding as fact that Government's inclusion of weight as a major performance concern "was a pretext"); *id.* ("The Navy used alleged defaults that were longstanding issues between the parties that previously it did not believe justified terminating the contract for default.").

The Government now attempts to contend that the contractors actually received a judgment on the merits of their asserted defenses prior to the termination. *See* Op. Cert. 13-14. The Government points to a few isolated pieces of evidence that suggest at most that the contracting officer had spent some time on the case, had certain beliefs, and made some conclusory statements. *See id.* But the trial court made extensive factual findings that the contracting officer had not planned to terminate the contract, had virtually no time to make his termination decision, and never *determined* prior to termination whether the contractors' defenses to the termination for default were valid. *See* Pet. App. 42a-46a; 52a-59a.

The trial court found: "no one in the Government exercised discretion in terminating this contract for default." *id.* at 57a. No one in the Government considered, much less resolved, the contractors' substantial defenses to a default termination. *See id.* (Secretary Cheney "did not consider contractor defaults or any reasons that might have excused those defaults"); *id.* at 55a (the contracting officer "did not review the contractors' claims for equitable adjustments. He could not give adequate attention to the claims that may have excused the alleged defaults in that time, especially those involving superior knowledge issues."). As the trial court found as fact, "[t]he decision to terminate was made hastily without consideration of relevant facts." *Id.* at 52a. The Government did not challenge these factual findings on appeal, *see supra* note 1, does not challenge them here, and those facts are finally decided against it.

This petition presents a core legal dispute: whether the Government, prior to subjecting a public contractor to the forfeiture of a default termination, must make a reasoned judgment on the merits of the contractor's defenses to such a forfeiture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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